

# Protecting the child's best interest in international parental abduction of children: mediation in the 1980 Hague Convention cases

## Abstract

*The 1980 Hague Convention on the Civil Aspects of International Child Abduction was the first binding international instrument to address the phenomenon of cross-border child abduction, which appeared as a side-effect of ongoing globalisation in the second half of the 20th century. The 1980 Hague Convention is undoubtedly the most successful and widespread instrument of direct cross-border cooperation between states to deal with the international child abduction. Nonetheless, the practical significance of this 40-year-old instrument is diminished by the fact that it allows only for a limited consideration of the specific situation of an individual child, whose careful consideration the present-day children's rights approach, in particular the principle of the best interest of the child, otherwise dictates. International family mediation, carried out by a qualified cross-border family mediator, can nevertheless address some of the major downsides of the mandatory return mechanism. The paper explores how in the 1980 Hague Convention cases the child's best interest can be secured through international family mediation.*

**Keywords:** *child's best interest, cross-border child abduction, international family mediation*

## Streszczenie

*Słowa kluczowe: dobro dziecka, uprowadzenie dziecka za granicę, międzynarodowa mediacja rodzinna*

## I. Introduction

The development of a global society runs parallel with the emerging interconnectedness of not only states and economies, but also cultures, societies, and individuals. Unfortunately, as Hans van Loon highlights, an effect of globalisation is that it intensifies and multiplies risks for families and children, including in their mutual relations, as they migrate, increasingly and on a global scale, across international borders<sup>1</sup>. Such risks involve issues related *inter alia* to the custody of children, access rights, relocation, and parental child abduction.

International parental child abduction involves situations where one parent removes the child to another state or retains the child there without the consent of the other parent, which is referred to in the international documents as the “wrongful removal” or “wrongful retention” of a child<sup>2</sup>. It might typically occur in binational families or families otherwise having bonds with more than one country or spread over different countries<sup>3</sup>. Needless to say, such family disruption deeply affects the emotional, mental, and physical development of the abducted children. They suffer from the sudden upsetting of their stability, the traumatic loss of contact with either of their parents, and the uncertainty and frustration that come with the necessity to adapt to new cultural conditions, unknown school and family milieu, or even an unknown language<sup>4</sup>. Such circumstances without any doubt prove challenging for children of any age, but they are especially so for small children, who do not fully understand the situation in which they find themselves. According to statistics published by the Hague Conference of Private International Law, young children (i.e. on average under seven years old) form the majority of those involved in cross-border parental abduction<sup>5</sup>.

<sup>1</sup> H. van Loon, *Protecting Children across Borders: The Interaction between the CRC and the Hague Children's Conventions*, [in:] *The United Nations Convention on the Rights of the Child. Taking Stock after 25 Years and Looking Ahead*, T. Liefwaard, J. Sloth-Nielsen (eds.), p. 32, Leiden 2017, [https://doi.org/10.1163/9789004295056\\_004](https://doi.org/10.1163/9789004295056_004).

<sup>2</sup> According to Article 3 of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Convention, the removal or retention of a child shall be considered wrongful where:

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and  
b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

<sup>3</sup> According to C. Paul and S. Kiesewetter, in Europe alone, more than 170,000 binational couples divorce each year, see: C. Paul, S. Kiesewetter, *Foreword*, [in:] *Cross-Border Family Mediation*, C. Paul, S. Kiesewetter (eds.), Frankfurt am Main 2014, p. 11.

<sup>4</sup> E. Pérez-Vera, *Explanatory Report to Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, [in:] *Acts and Documents of the Fourteenth Session (1980)*, tome 3, *Child abduction*, Hague Conference on Private International Law, p. 432. Further reading: M. Freeman, *The Effects and Consequences of International Child Abduction*, “Family Law Quarterly” 1998, Vol. 32, pp. 603–621; G.L. Greif, *The Long-term Aftermath of Child Abduction: Two Case Studies and Implications for Family Therapy*, “The American Journal of Family Therapy” 2009, Vol. 37, pp. 273–286, <https://doi.org/10.1080/01926180902754711>.

<sup>5</sup> According to the statistics presented by the Hague Conference on Private International Law, in 2015, 2,997 children were involved in a total of 2,270 applications for the return of the child, and the average age of a child involved in a return application was 6.8 years. N. Lowe, V. Stephens, *A Statistical Analysis of Applications Made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Hague 2018, para. 10. More recent statistics are not available.

Over the years, the international community has created cross-border cooperation mechanisms to allow the parent left behind to seek the return of the child and to deter cross-border child abduction in general. Their underlying presumption is that international parental abduction needs to be denied any legal recognition or benefits (e.g. in terms of jurisdiction), and that it is in the children's best interest to ensure their fast return to their place of normal residence. In parallel, and especially since the adoption of the United Nations Convention on the Rights of the Child<sup>6</sup>, a need to balance the practical outwork of the international cooperation under private international law with the children's rights approach has emerged, which requires that the best interest of a specific child be adequately considered.

This article seeks to demonstrate that international family mediation, understood as a process conducted by a third person (mediator), assisting parents to re-establish communication and to resolve the family conflict themselves<sup>7</sup>, provides for a highly suitable forum to discuss and consider the individual child's well-being. The author addresses cross-border family mediation in relation to securing the child's best interest in the 1980 Hague Convention cases, and highlights the advantages of an agreed solution, which can improve the situation of children trapped in highly escalated family conflicts.

## 2. International instruments relevant to cross-border child abduction

The international legal framework relevant to cross-border child abductions comprises two groups of international instruments. The most directly relevant, and that by far most closely associated with the international child abduction problem, are the instruments establishing mechanisms of civil judicial cooperation. The key document in this field is the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the 1980 Hague Convention)<sup>8</sup>. On the European Union (hereinafter: "EU") level, the main document relevant to judicial cooperation in child abduction cases is

<sup>6</sup> Convention on the Rights of the Child, adopted in New York on 20 November 1989 by General Assembly resolution 44/25, UN Treaty Series, Vol. 1577, No. 27531.

<sup>7</sup> Defence for Children International Italy, *Improving the Situation of Children in International Child Abduction Cases through Judicial Cooperation and Family Mediation – iCare*, p. 5, available at: <https://project-icare.eu/wp-content/uploads/2022/09/D2.3-Recommendation-List-Analysis-report.pdf> [accessed on: 13 February 2023].

<sup>8</sup> Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter: "1980 Child Abduction Convention"), adopted in The Hague on 25 October 1980 under the auspices of the Hague Conference on Private International Law, UN Treaty Series, Vol. 1343, No. 22514. Several other instruments of private international law are also relevant to international child abduction to various extents, see e.g.: Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, adopted in the Hague on 19 October 1996, European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, adopted in Luxembourg on 20 May 1980 under the auspices of the CoE, UN Treaty Series, Vol. 1562, No. 25701, and Convention on Contact Concerning Children, adopted in Strasbourg on 15 May 2003 under the auspices of the CoE, CETS, No. 192.

Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction-recast (Brussels II ter Regulation), which upholds the 1980 Hague Convention mechanism while complementing it in the relations between the Member States of the European Union<sup>9</sup>.

The 1980 Hague Convention is designed to protect children internationally from the harmful effects of their wrongful removal or retention<sup>10</sup>. It establishes a mandatory return mechanism, which requires the authorities of contracting states to expeditiously order the return of any child who has been wrongfully removed or retained, where the child was habitually resident in another contracting state immediately prior to abduction<sup>11</sup>. In the drafting of the instrument, it was assumed that returning children to the state of their habitual residence is generally in their best interest and, simultaneously, plays a preventive role. Therefore, children's interests receive two-fold protection in the 1980 Hague Convention: (i) by returning the child to the state with which he or she has the closest connection and ensuring litigation on custody in the place of the child's habitual residence, and (ii) in general sense, by deterring potential abductors<sup>12</sup>. The two objectives of the 1980 Hague Convention, the preventive one and that of securing the immediate reintegration of the child into their normal environment, correspond to the drafter's idea of what constitutes the best interest of the child<sup>13</sup>. The children's welfare under the 1980 Hague Convention is considered within the exceptions to the obligatory return mechanism, which can be grounded on objective reasons relating either to the child or to the environment with which the child is most closely connected<sup>14</sup>. Faced with a situation giving grounds for one of the exceptions, the court seized with a return application has wide discretion

<sup>9</sup> Council Regulation (EU) 2019/1111 of 25 June 2019 on Jurisdiction, the Recognition and Enforcement of Decisions in Matrimonial Matters and the Matters of Parental Responsibility, and on International Child Abduction (recast), Official Journal of the European Union L 178/1 (Brussels II ter Regulation). The Regulation entered into force from 1 August 2022, replacing the previous Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No 1347/2000, Official Journal of the European Union L 338 (Brussels II bis Regulation).

<sup>10</sup> See the Preamble of the 1980 Hague Convention.

<sup>11</sup> The 1980 Hague Convention applies to all children under 16 years of age (Article 4).

<sup>12</sup> S. Vigers, *Mediating International Child Abduction Cases. The Hague Convention*, Oxford-Portland 2011, p. 65; R. Schuz, *The Hague Child Abduction Convention and Children's Rights*, "Transnational Law & Contemporary Problems" 2002, Vol. 12, No. 2, p. 398.

<sup>13</sup> E. Pérez-Vera, *Explanatory...*, [in:] *Acts...*, tome 3, *Child...*, p. 432.

<sup>14</sup> E. Pérez-Vera, *Explanatory...*, [in:] *Acts...*, tome 3, *Child...* The exceptions listed in Article 13 are: (a) the person or institution having the care of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or (b) a grave risk is that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; and (c) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to consider its views. A further exception is laid down in Article 20, according to which "the return of the child [...] may be refused if this would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms". Under Article 12 the court does not have the obligation to return the child where the application was submitted more than one year after the date of the wrongful removal or retention, and it can be demonstrated that the child is now settled in its new environment.

regarding whether to order the return of the child. The exceptions to mandatory return should be interpreted in a restrictive way, and their application is further limited under EU law<sup>15</sup>.

The second group of documents relevant to cross-border child abduction are international human rights instruments, such as the 1989 UN Convention on the

Rights of the Child (hereinafter: "CRC"), the European Convention on Human Rights (hereinafter: "ECHR")<sup>16</sup>, the Charter of Fundamental Rights of the European Union<sup>17</sup>, and the European Convention on the Exercise of Children's Rights<sup>18</sup>. Their relevance to cross-border child abduction stems primarily from the principle of the best interest of the child, either directly recognized in the international documents or derived from the right to the protection of private and family life, as well as from the general need to include the children's rights dimension in the international child abduction cases.

The judicial cooperation mechanisms under private international law and the human rights instruments have been increasingly interacting in various ways<sup>19</sup>.

Conflict-of-laws rules are currently expected not only to create a coherent system of procedural cooperation between contracting states, but also to grant protection to human rights, and in particular to children's rights and child's best interests<sup>20</sup>. On the

other hand, the adoption of uniform private international rules on matters concerning children is itself a way to facilitate the implementation of the principle of the best interest of the child<sup>21</sup>. This belief is shared equally by scholars and by international bodies. The Committee on the Rights of the Child encourages the states to ratify and implement the conventions adopted under the auspices of the Hague Conference on Private International Law, such as the 1980 Hague Convention, the 1993 Hague

Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption<sup>22</sup>, and the 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations<sup>23</sup>, as they facilitate the application

<sup>15</sup> See Article 27 para. 3 of the Brussels II ter Regulation.

<sup>16</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR), adopted under the auspices of Council of Europe in Rome on 4 November 1950, ETS No. 005.

<sup>17</sup> Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000, Official Journal of the European Union C 326/391.

<sup>18</sup> European Convention on the Exercise of Children's Rights, adopted in Strasbourg on 25 January 1996 under the auspices of the Council of Europe, ETS No. 160.

<sup>19</sup> L. Carpaneto, *Impact of the Best Interests of the Child on the Brussels II ter Regulation*, [in:] *Fundamental Rights and Best Interests of the Child in Transnational Families*, E. Bergamini, C. Ragni (eds.), Cambridge 2019, p. 266. See also: H. van Loon, *Protecting...*, [in:] *The United...*, pp. 31–46; L.R. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law*, The Hague 2014.

<sup>20</sup> L. Carpaneto, *Impact...*, [in:] *Fundamental...*, p. 266. See also: M. Župan, *The Best Interests of the Child: A Guiding Principle in Administering Cross-border Child-related Matters?*, [in:] *The United Nations Convention on the Rights of the Child. Taking Stock after 25 Years and Looking Ahead*, T. Liefwaard, J. Sloth-Nielsen (eds.), Leiden 2017, pp. 213–229.

<sup>21</sup> L. Carpaneto, *Impact...*, [in:] *Fundamental...*, p. 266.

<sup>22</sup> Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, adopted in the Hague on 29 May 1993, UN Treaty Series vol. 1870, registration No.: 31922.

<sup>23</sup> Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, adopted in the Hague on 2 October 1973, UN Treaty Series vol. 1021, registration No.: 15001.

of the child's best interests and provide guarantees for its implementation when the parents live in different countries<sup>24</sup>.

### 3. The notion of child's best interest in the international law

The best interest of the child is a fundamental, all-pervading principle underpinning the Convention on the Rights of the Child, expressed in its Article 3 para. 1, according to which "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". Apart from the general context of Article 3, several other provisions of the CRC refer to the best interest of the child in specific situations, such as the situation of a child separated from his or her parents (Article 9), deprived of liberty (Article 37), or during adoption proceedings (Article 21). On the European level, the principle of the best interest of the child has been laid down in Article 24 of the EU Charter of Fundamental Rights, which is modelled on and inspired by the provisions of the Convention on the Rights of the Child, particularly Articles 3, 9, 12, and 13 thereof<sup>25</sup>. The idea of protecting the child's best interests is also central to the European Convention on the Exercise of Children's Rights.

The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the CRC and the holistic development of the child, understood as physical, mental, spiritual, moral, psychological, and social development, to secure the integrity of the child and promote his or her human dignity<sup>26</sup>. According to the Committee on the Rights of the Child, the full application of the concept of the child's best interests requires the development of a rights-based approach, engaging all stakeholders<sup>27</sup>. As such, the child's best interest is a threefold concept that should be understood as: (i) a substantive right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered, (ii) an interpretative legal principle, according to which if a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen, and (iii) a procedural rule requiring that if a decision

<sup>24</sup> Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC/C/GC/14, para. 68, available at: [https://www2.ohchr.org/english/bodies/crc/docs/gc/crc\\_c\\_gc\\_14\\_eng.pdf](https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf) [accessed on: 13 February 2023].

<sup>25</sup> According to Article 24 para. 2 of the EU Charter of Fundamental Rights, "in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration". See also Explanations Relating to the Charter of Fundamental Rights, Official Journal of the European Union C 303/17.

<sup>26</sup> Committee on the Rights of the Child, *General comment No. 14*, paras. 4–5. See also: J. Zajęzkowska-Burtowy, *Dobro dziecka jako wartość podlegająca szczególnej ochronie w sprawach dotyczących wykonywania władzy rodzicielskiej i kontaktów z dzieckiem*, [in:] *Realizacja zasady dobra dziecka w mediacji w sprawach dotyczących wykonywania władzy rodzicielskiej i kontaktów*, J. Mucha (ed.), Warszawa 2021, Parts 1 and 2, LEX/el. 2021.

<sup>27</sup> Committee on the Rights of the Child, *General comment No. 14*, para. 5.



is to be made that will affect a specific child, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned<sup>28</sup>.

Among the rights protected by the Convention on the Rights of the Child, four are particularly relevant to safeguarding the child's best interests within the context of international child abduction. They include, apart from the very right of the child to have their welfare protected, the right to maintain regular contact with both parents (which appears in three different forms in the CRC, i.e. in Articles 7 para. 1, 9 para. 3, and 10 para. 2)<sup>29</sup>, as well as the child's right to be heard in judicial and administrative proceedings, protected under Article 12 para 2 of the CRC, and the right of the child to have their views respected, which stems from Article 12 para. 1 of the CRC<sup>30</sup>. It should be noted that while generally the term "child" within the meaning of the CRC refers to every person below the age of 18 (Article 1 of the CRC), within the context of the 1980 Hague Convention only children below 16 years of age are so considered (Article 4 of the 1980 Hague Convention).

It is generally accepted that assessing the child's best interests should be conducted individually and on a case-by-case basis for each child or group of children. As the Committee on the Rights of the Child has explained, "determining what is in the best interest of the child should start with an assessment of the specific circumstances that make the child unique"<sup>31</sup>. The assessment should be made on the basis of several general elements and indications, such as: the child's views, the child's identity, preservation of the family environment and maintain relations, the care, protection, and safety of the child, the child's right to health, the right to education, and the situations of vulnerability<sup>32</sup>. The circumstances of the given case influence which of these elements are relevant for the child and how they are weighted against each other.

The European Court of Human Rights (hereinafter: "ECtHR") has several times addressed the principle of the best interest of the child, which is non-existent in explicit terms in the ECHR but is interpreted in the context of the right to protection of private and family life (Article 8 of the ECHR). According to the ECtHR, in matters of international child abduction, Article 8 of the ECHR should be interpreted

<sup>28</sup> Committee on the Rights of the Child, *General comment No. 14*, para. 6.

<sup>29</sup> Article 7 para. 1 of the CRC guarantees the right of the child to know and be cared for by his or her parents; Article 9 para. 3 of the CRC requires that states parties respect the right of the child separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests, while Article 10 para. 2 of the CRC states that "a child whose parents reside in different states shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents".

<sup>30</sup> According to Article 12 para. 1 of the CRC, "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child". It has been argued that although the recognition of the child's right to participate in decision making is of fundamental importance, the provision is of limited value in practical terms, as it does not provide any guidance regarding the relative weight that should be attributed to the views of the child, leaving wide discretion to the judge, see: R. Schuz, *The Hague...*, p. 404.

<sup>31</sup> Committee on the Rights of the Child, *General comment No. 14*, para. 49.

<sup>32</sup> Committee on the Rights of the Child, *General comment No. 14*, paras. 53–79.



in the light of the 1980 Hague Convention and the Convention on the Rights of the Child<sup>33</sup>. In the ECtHR's opinion, "the child's interests" are primarily the following two: to have his or her ties with his or her family maintained, unless it is proved that such ties are undesirable, and to be able to develop in a sound environment<sup>34</sup>. The ECtHR has consistently expressed the opinion that under the 1980 Hague Convention the return of an abducted child cannot be ordered automatically or mechanically<sup>35</sup>. The ECtHR pays close attention to the principle of expeditious proceedings, which forms part of the states' obligation under the 1980 Hague Convention, but equally under Article 8 of the ECHR. In the light of the child's best interest, cases pertaining to the reunification of children with parents require urgent handling because the passage of time can have irremediable consequences for the relations between the child and the left-behind parent<sup>36</sup>.

Similarly to the ECtHR, the Court of Justice of the European Union (hereinafter: "CJEU") has also consequently linked the best interest of the child to the urgency of ruling in cases of child removal, in particular where the separation of a child from the parent with custody rights would be likely to bring about a deterioration of the child's relationship with the parent or to cause psychological damage<sup>37</sup>. While interpreting the provisions of the EU law relevant to cross-border child abduction, the CJEU consistently considers the best interest of the child<sup>38</sup>. Such influence of the principle of the child's welfare and in general of children's rights on the judicial cooperation

<sup>33</sup> See e.g. ECtHR, Case *Ignaccolo-Zenide v. Romania*, Judgement of 25 January 2000, Application No. 31679/96; ECtHR, Case *Neulinger and Shuruk v. Switzerland*, Grand Chamber Judgement of 6 July 2010, Application No. 41615/07, para. 132.

<sup>34</sup> ECtHR, Case *Šneerson and Kampanella v. Italy*, Judgement of 12 July 2011, Application No. 14737/09, para. 85; *Neulinger and Shuruk v. Switzerland*, para. 136.

<sup>35</sup> See e.g. *Šneerson and Kampanella v. Italy*, para. 85; *Neulinger and Shuruk v. Switzerland*, para. 138. Although the Court of Strasbourg no longer requires from the judicial authorities an in-depth examination of the entire family situation of the child, a requirement expressed in *Neulinger and Shuruk v. Switzerland*, it nevertheless expects the Hague courts to carry out an effective examination of the possible grounds for refusal – a standpoint presented in the *X v. Latvia*, and recently reaffirmed e.g. in *Moga v. Poland* case, see: ECtHR, Case *X v. Latvia*, Grand Chamber Judgement of 26 November 2013, Application no. 27853/09; ECtHR, Case *Moga v. Poland*, Judgement of 17 March 2022, Application No. 80606/17.

<sup>36</sup> See e.g. ECtHR, Case *R.S. v. Poland*, Judgement of 21 July 2015, Application No. 63777/09, para. 70; ECtHR, Case *K.J. v. Poland*, Judgement of 1 March 2016, Application No. 30813/14, para. 72. Further reading on the ECtHR's case law in cross-border child abduction cases: L. Walker, *The Impact of the Hague Abduction Convention on the Rights of the Family in the Case-law of the European Court of Human Rights and the UN Human Rights Committee: The Danger of Neulinger*, "Journal of Private International Law" 2010, Vol. 6, No 3, pp. 649–682, <https://doi.org/10.5235/174410410794046288>; P. Beaumont, K. Trimmings, L. Walker, J. Holliday, *Child Abduction: Recent Jurisprudence of the European Court of Human Rights*, "International and Comparative Law Quarterly" 2015, Vol. 64, Issue 1, pp. 39–63, <https://doi.org/10.1017/S0020589314000566>; P. McEleavy, *The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?*, "Netherlands International Law Review" 2015, Vol. 62, pp. 365–405, <https://doi.org/10.1007/s40802-015-0040-z>; E. Wojtaszek-Mik, *Dobro dziecka a odmowa jego wydania na podstawie art. 13 ust. 1 lit. b Konwencji haskiej dotyczącej cywilnych aspektów uprowadzenia dziecka za granicę*, "Prawo w Działaniu" 2022, Vol. 50, pp. 55–59, <https://doi.org/10.32041/pwd.5002>.

<sup>37</sup> See e.g. CJEU, Case C-491/10 PPU, *Aguirre Zarraga* [2010] ECR I-14247, para. 39; CJEU Case C-195/08 PPU *Linau* [2008] ECR I-5271, para. 44; CJEU, Case C-211/10 PPU *Povse* [2010] ECR I-0000, para. 35.

<sup>38</sup> K. Lenaerts, *The Best Interests of the Child Always Come First: The Brussels II bis Regulation and the European Court of Justice*, "Jurisprudencija/Jurisprudence" 2013, Vol. 20(4), pp. 1325–1326, <https://doi.org/10.13165/JUR-13-20-4-02>.

in family matters within the EU is embedded in the very hierarchy of the EU norms: the Brussels II bis Regulation and its successor, the Brussels II ter Regulation, as secondary sources of EU law need to be interpreted in a way that is compliant with the EU Charter of Fundamental Rights, being primary EU law, which requires also compliance with its Article 24 on the rights of the child.

#### 4. Child's welfare concerns relating to the application of the 1980 Hague Convention

As a rule, the practical outcome of the Hague mechanism entails the child's return to the place of habitual residence for the duration of any litigation on custody and contact rights, for which the court seized with a return application has no international jurisdiction<sup>39</sup>. As mentioned earlier, the 1980 Hague Convention assumes that returning children to their home country where they lived before the abduction is in their best interests; therefore, it provides only limited grounds for a child's non-return. However, while the 1980 Hague Convention seeks to protect the collective interests of children by providing "zero tolerance" for abduction and deterring it in general, the interests of a particular child might not always be given sufficient consideration under the Hague mechanism<sup>40</sup>. This opposition between the child's welfare *in abstracto* and the child's best interest *in concreto* became even more apparent and disputed in the years following the adoption of the 1980 Hague Convention, which saw a paradigm shift in the legal and social status of children. The international community has shifted away from the more traditional concepts of parental rights and child's welfare, still reflected in the 1980 Hague instrument, towards the children's right approach, landmarked by the adoption of the 1989 Convention on the Rights of the Child with its individual human rights focus<sup>41</sup>. Therefore, finding a proper balance between the technical approach – based on the private international law and the need to safeguard the best interest of the child in question – is a primary present-day concern and challenge related to the 1980 Hague Convention<sup>42</sup>.

<sup>39</sup> See Article 16 of the 1980 Hague Convention.

<sup>40</sup> S. Vigers, *Mediating...*, p. 63; R. Schuz, *The Hague...*, pp. 397–398.

<sup>41</sup> The Convention on the Rights of the Child recognizes the child as a subject of rights, which is manifested in that the child holds rights which have an influence on her or his life (participatory rights under Article 12 of the CRC), and not only rights derived from her or his vulnerability (protection) or dependency on adults (provision), see: Committee on the Rights of the Child, *General comment No. 12 (2009) on The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, para. 18, available at: <https://www2.ohchr.org/english/bodies/crc/docs/advanceversions/crc-c-gc-12.pdf> [accessed on: 13 February 2023]. The children's right approach is not fully supportive towards deterring abduction in the public interest to protect children as a notional group, if it leads to violating individual child's rights. R. Schuz, *The Hague...*, pp. 397–398.

<sup>42</sup> On the deterrence v. best interest of the child see e.g.: L. Heckendorn Urscheler, I. Pretelli, J. Curran, K.T. Druckman, S. De Dycker, J. Skala, H. Westermarck, J. Fournier, A. Parkes, A. Aronovitz, A. Cekanavicius, T. Dezso Ziegler, I. Curry-Sumner, A. Fötschl, K. Jagodzinska, A. Sebeni, *Cross-border Parental Child Abduction in the European Union. Study for the LIBE Committee*, Brussels 2015, p. 86, available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/510012/IPOL\\_STU%282015%29510012\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/510012/IPOL_STU%282015%29510012_EN.pdf) [accessed on: 13 February 2023].

Even though the 1980 Hague Convention lays down the child's objection as possible grounds for non-return (in Article 13 para. 2), the children's rights approach missing from the Convention mechanism might nevertheless lead in practice to the domestic authorities ignoring the child's views, as Kotas-Turoboyska demonstrates in her study<sup>43</sup>. In numerous cases, the courts adhere too literally to the general "zero tolerance" for abduction philosophy of the 1980 Hague Convention, without considering that the instrument was drafted four decades ago at a time when the need for the empowerment of the child in proceedings affecting them was not yet given legal recognition. As a consequence, children might still be wrongly treated as the objects and not the subjects of the return proceedings<sup>44</sup>.

Finding the appropriate balance between the general assumptions of the 1980 Hague Convention and the well-being of an individual child becomes even more relevant once we consider that since the adoption of the Hague instrument, the phenomenon of cross-border child abduction has undergone a sea change demographically, followed by a major change in the practical outcome of the return mechanism. At the time of the drafting of the 1980 Hague Convention, the typical case of abduction (ca. 70% of cases) was that of a non-custodial father abducting a child (children) from the mother<sup>45</sup>. Against this background, The Hague mechanism typically led to the obligatory return of the child to the mother, at least for the duration of the subsequent proceedings on custody rights. Currently, the typical case of cross-border child abduction is that of a mother abducting the child: in 2003 and 2015, respectively, 68% and 73% of abducting parents were mothers (either the primary carer or a joint-primary carer)<sup>46</sup>. This change in the demographics of abduction has resulted in the mandatory return of an abducted child engendering a risk of his or her separation from the mother, which raises major concerns in the context of the child's best interest<sup>47</sup>.

In the context of these demographic changes, the practical outcome of the 1980 Hague Convention also carries a risk of a multiple relocations of the child. In the now-typical situation, the abducting parent is the mother with primary or joint-primary custody rights, and the left-behind parent either does not want or is unlikely to be granted primary care of the child<sup>48</sup>. As a consequence, it cannot be ruled out that a child who was first abducted abroad by the mother will then be returned to the home country to the father, only to be allowed by the court deciding on custody rights to relocate abroad with the mother after she has been granted primary or joint custody

<sup>43</sup> S. Kotas-Turoboyska, *Kryteria oceny sprzeciwu dziecka wyrażonego na podstawie art. 13 ust. 2 Konwencji dotyczącej cywilnych aspektów uprowadzenia dziecka za granicę w świetle wybranego orzecznictwa sądów*, Prawo w Działaniu 2021, Vol. 48, pp. 81–95, <https://doi.org/10.32041/pwd.4803>.

<sup>44</sup> On the EU level, the Brussels II ter Regulation attempts to remedy this situation by emphasizing in Article 26 the child's right to express his or her views in return proceedings.

<sup>45</sup> S. Vigers, *Mediating...*, pp. 62–63, 65–66.

<sup>46</sup> Statistics after N. Lowe and V. Stephens, *A statistical...*, paras. 10–11.

<sup>47</sup> S. Vigers, *Mediating...*, pp. 65–66.

<sup>48</sup> S. Vigers, *Mediating...*, p. 64.

rights. In this case, the child may suffer the trauma of three or more relocations in a short time<sup>49</sup>.

## 5. Benefits of the international family mediation in cross-border child abduction cases

International instruments encourage alternative dispute resolution methods, especially mediation, to solve family disputes<sup>50</sup>. Unlike other civil or commercial disputes, family conflicts arise in a context of distressing emotions and increase them; and furthermore, they involve persons who will have interdependent and continued relationships and affect all the members of the family, especially children<sup>51</sup>. The results of research on the use of family mediation has shown that it has the potential to: (i) improve communication between members of the family, (ii) reduce conflict between parties in dispute, (iii) produce amicable settlements and provide continuity of personal contacts between parents and children, (iv) lower the social and economic costs of separation and divorce for the parties themselves and states, and (v) reduce the length of time otherwise required to settle conflict<sup>52</sup>. Additionally, it leads to the empowerment of parents and might help them to better (re)focus on the child by making them aware that the child is also affected by their dispute<sup>53</sup>.

In addition to the advantages of mediation inherent in the process of reaching an agreed solution, mediation in international child abduction has several additional values specific to the legal and social context of such disputes. The added value of mediation in cross-border child abduction cases lies in the possibility that it might offer a remedy to some of the child welfare concerns surrounding the implementation of the 1980 Hague Convention mechanism. As explained earlier, the general premises and technical approach of the 1980 Hague Convention make it challenging to pay

<sup>49</sup> S. Vigers, *Mediating...* Further child welfare concerns have been raised in the context of The Hague mechanism and its mandatory return where issues of family violence are present. It has been argued that the return mechanism does not provide victims of domestic violence with effective protection where a mother has abducted the child in an attempt to flee from an abusive father and the return mechanism may lead to their obligatory return to unsafe jurisdiction; see more: M.H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, "Fordham Law Review" 2000, Vol. 69, Issue 2, pp. 593–706.

<sup>50</sup> See e.g. Article 13 of the European Convention on the Exercise of Children's Rights; Article 31 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; Committee of Ministers of the Council of Europe, Recommendation No. R (98) on Family Mediation, adopted on 21 January 1998.

<sup>51</sup> Recommendation No. R (98), para. 5.

<sup>52</sup> Recommendation No. R (98), para. 7.

<sup>53</sup> M. Skibińska, *Procesowe i psychologiczne gwarancje realizacji zasady dobra dziecka w sprawach dotyczących wykonywania władzy rodzicielskiej i kontaktów a mediacja*, [in:] *Realizacja zasady dobra dziecka w mediacji w sprawach dotyczących wykonywania władzy rodzicielskiej i kontaktów*, J. Mucha (ed.), Warszawa 2021, Part 7, LEX/el. 2021. On the benefits of international family mediation, see also: S. Vigers, *Mediating...*, pp. 71–73; O. Łachacz, *Mediacja międzynarodowa w sprawach rodzicielskiego uprowadzenia dziecka za granicą – uwagi na tle skali zjawiska i rozwiązań prawnych stosowanych w państwach europejskich*, "Studia Prawnoustrojowe" 2016, No. 33, pp. 182–183.

sufficient attention to the individual situation and interests of a child involved in a return application. The domestic court proceedings carried out under the 1980 Hague Convention are supposed to be summary and expeditious, as the Convention requires a decision to be reached within six weeks from the date of commencement of the proceedings<sup>54</sup>. Cross-border family mediation can play a helpful role by offering parents a less formal framework to discuss **their child's** welfare, and to agree upon such a solution that best suits the child's interests. The right of the child to have their interest taken as primary consideration, usually interpreted in the context of court proceedings, applies to the same extent to mediation and other ADR proceedings<sup>55</sup>. In this context, the mediator's role cannot be overestimated. The mediator shall assist the parents to separate their child's interests from their own interests and place the child's welfare before their own well-being (child-focused mediation)<sup>56</sup>. While the court oversees the implementation of the principle of the best interests of the child during judicial proceedings, in mediation the mediator and the parties undertake this duty<sup>57</sup>. Nonetheless, in several legal orders a mediated agreement (memorandum of understanding) requires court validation to become enforceable, which provides the court with an opportunity to verify whether the child's welfare was given sufficient consideration in mediation<sup>58</sup>. In some countries, e.g. France or Germany, agreements concerning the exercise of parental responsibilities need court approval verifying that they comply with "the best interests of the child" to obtain legal effect<sup>59</sup>. In Poland, a mediated agreement also needs to be validated by the court, and once validated, it has the binding effect of a settlement reached before the court<sup>60</sup>. The court refuses to validate the mediated agreement, in whole or in part, if it is contrary to the law or social norms, or intends to circumvent the law, or where it

<sup>54</sup> Article 11 of the 1980 Hague Convention.

<sup>55</sup> See: Committee on the Rights of the Child, *General comment No. 14*, para. 27; M. Skibińska, *Procesowe...*, [w:] *Realizacja...* (Part 2, in online access).

<sup>56</sup> For this reason, it is crucial that cross-border family mediators have appropriate socio-psychological training or that they mediate in teams of two, where at least one of the mediators has qualifications in that field. On the qualifications and training necessary for cross-border family mediators, see e.g.: HCCH, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part V – Mediation*, The Hague 2012, paras. 90–105. On the possible conflict between the best interests of the child and the interests of the parents, see e.g.: W. Stojanowska, *Dobro dziecka a dobro rodziców*, [in:] *Granice prawa. Księga jubileuszowa Profesora Andrzeja Siemaszki*, P. Ostaszewski, K. Buczkowski (eds.), Warszawa 2020, pp. 799–818.

<sup>57</sup> M. Skibińska, *Procesowe...*, [w:] *Realizacja...*, Part 7 (in online access). On the role of mediator in the assessment of the best interests of the child in mediation, in relation to different techniques of mediation, see e.g.: K. Salminen, *Mediation and the Best Interests of the Child from the Child Law Perspective*, [in:] *Nordic Mediation Research*, A. Nylund, K. Ervasti, L. Adrian (eds.), Cham 2018, pp. 214–219.

<sup>58</sup> M. Skibińska, *Procesowe...*, [w:] *Realizacja...*, Part 7 (in online access); S. Vigers, *Mediating...*, p. 70. See also: Rendering the agreement legally binding and enforceable, in HCCH, *Guide to Good Practice...*, p. 79.

<sup>59</sup> M. Lloyd, *The Status of Mediated Agreements and their Implementation*, [in:] *Family Mediation in Europe – Proceedings, 4th European Conference on Family Law, Palais de l'Europe, Strasbourg, 1–2 October 1998*, Strasbourg 2000, pp. 87–96.

<sup>60</sup> Article 183<sup>15</sup> § 1 of the Act of 17 November 1964 on the Code of Civil Procedure (ustawa z 17.11.1964 r. – Kodeks postępowania cywilnego), consolidated text: Journal of Laws [Dz.U.] of 2021 Item 1805, as amended.



is incomprehensible or contains contradictions<sup>61</sup>. The Polish regulation on validating a mediated agreement does not refer to the best interests of the child; however, from the point of view of safeguarding the child's welfare in international child abduction proceedings (and generally in proceedings in family matters), introducing a premise allowing the court to check whether the mediated agreement secures the best interest of the child concerned would be worth considering for the Polish legislator.

Cross-border family mediation could be a valuable remedy to the risk of multiple relocations of the child, who could face first the abduction abroad, then mandatory return to the home country upon the return order, and possibly a new relocation abroad after the litigation on custody rights (see above). During mediation, parents might already discuss the "final" destination of the child and consider the best ultimate arrangement. Having the parents agree to the child remaining in the state of abduction with the abducting parent, the child can avoid a return order and being temporarily relocated to the left-behind parent. In such a case the mediation goes beyond the issue of return or non-return to focus also on further issues such as visitation rights and contact arrangements<sup>62</sup>. If parents nevertheless agree on the return of the child, which, in several cases, equals the return of the abducting mother as well, mediation can provide a forum to discuss the modalities and conditions of their return<sup>63</sup>. Providing a "soft landing" could minimize the stress connected with the return to the place from before the abduction, and help to prevent new family conflicts from arising.

Additionally, international family mediation can also be helpful in securing the child's right to maintain personal relations with both parents, guaranteed in the CRC and in the EU Charter of Fundamental Rights. The win-win philosophy of mediation, as opposed to the adversarial nature of court proceedings, is more favourable to preserving an ongoing relationship between both parents and the child after the family breakup. As some studies report, continuity of contacts between a child and the non-resident parent has proven to be better when parents have resorted to

<sup>61</sup> Article 183<sup>14</sup> § 3 of the Code of Civil Procedure. For more on validating the agreement reached before a mediator in civil cases in Poland, see: K. Flaga-Gieruszyńska, *Kryteria kontroli sądowej ugody zawartej przed mediatorem*, [in:] *Ius est a iustitia appellatum. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Wiśniewskiemu*, T. Ereciński, J. Gudowski, M. Pazdan, M. Tomalak (eds.), Warszawa 2017, pp. 131–143.

<sup>62</sup> S. Vigers, *Mediating...*, p. 65. It is accepted that the court examining a return application under the 1980 Hague Convention is competent to deal only with the issue of return, for which it has international jurisdiction. Mediation in Hague cases is not limited in the same way, and it can also cover, apart from the issue of return or non-return of the child, long-term issues related to parental responsibility, such as custody and contact rights or child maintenance, other financial arrangements, or the decision on the child's permanent relocation. Although concluding such "package agreements" in mediation is not contrary to the 1980 Hague Convention, obtaining legal effect and enforceability of such agreements may nevertheless give rise to certain difficulties due to jurisdictional issues. The court seized with a return application has jurisdiction to approve the mediated agreement in the part relating to the decision on return or non-return of the child, but will not be competent to validate the agreement relating to e.g. custody rights or long-term visitation arrangements. See more: E. Carl, M. Erb-Klünemann, *Integrating Mediation into Court Proceedings in Cross-border Family Cases*, [in:] *Cross-border Family Mediation*, C. Paul, S. Kiesewetter (eds.), Frankfurt am Main 2014, pp. 58–60; HCCH, *Guide to Good Practice...*, paras. 186–187.

<sup>63</sup> S. Vigers, *Mediating...*, p. 67.

mediation rather than litigating custody<sup>64</sup>. It has also been demonstrated that a significant connection exists between the child's long-term well-being and the fairness of the solution obtained in the course of dealing with a cross-border family dispute, as perceived by the child's parents<sup>65</sup>. Children might develop emotional-behavioural problems if the solution attained in the family conflict was unfair, or at least it was not perceived as such by one parent. Mediation more than formal judicial proceedings is capable of restoring healthy relationships within the family and of empowering the parties to come to a mutually acceptable agreement<sup>66</sup>.

Unquestionably, one of the elements of a child's right to the protection of his or her best interests is the right to freely express her or his views in all matters affecting her or him and the subsequent right for those views to be given due weight, stemming from Article 12 of the CRC<sup>67</sup>. The Guide to Good Practice in the field of mediation, published by the Hague Conference on Private International Law with relation to the 1980 Hague Convention, identifies three important aspects of listening to the child in family disputes: (i) it provides insight into the child's feelings and wishes, which may be important when determining whether a solution is in the child's best interests, (ii) it may open the parents' eyes to their child's views and help them to distance themselves from their own positions for the sake of an acceptable common solution, and (iii) it respects the child's right to be heard while providing the child an opportunity to be informed about what is happening<sup>68</sup>. Moreover, it may give the child the feeling that he or she is participating in decision-making, which reduces feelings of frustration and powerlessness<sup>69</sup>. Nonetheless, active participation of the

<sup>64</sup> See e.g. R.E. Emery, L. Laumann-Billings, M.C. Waldron, D.A. Sbarra, P. Dillon, *Child Custody Mediation and Litigation: Custody, Contact, and Coparenting 12 Years after Initial Dispute Resolution*, "Journal of Consulting and Clinical Psychology" 2001, Vol. 69, Issue 2, pp. 323–332, <https://doi.org/10.1037/0022-006X.69.2.323>. In this study, long-term follow-up data were obtained that show that after 12 years after the initial dispute resolution, in families who had mediated, non-residential parents maintained more contact with their children and had a greater influence in co-parenting than in families where custody had been litigated, without increasing co-parenting conflict. See also: E.G. Montorsi, *Psychological Aspects of the Family Mediation*, [in:] *Mediation to Foster European Wide Settlement of Disputes*, F. Pesce, D. Rone (eds.), Rome 2016, p. 332; T. Buck, *An Evaluation of the Long-term Effectiveness of Mediation in Cases of International Parental Child Abduction*, Leicester 2012; S. Vigers, *Mediating...*, pp. 69–70.

<sup>65</sup> K. Van Hoorde, M. Putters, G. Buser, S. Lembrechts, K. Ponnet, T. Kruger, W. Vandenhoe, H. Demarré, N. Broodhaerts, C. Coruz, A. Larcher, D. Moralis, C. Hilpert, N. Chretiennot, *Bouncing Back: The Wellbeing of Children in International Child Abduction Cases*, 2017, p. 32, available at: [http://missingchildreneurope.eu/Portals/1/Docs/Compiled\\_research\\_report\\_final.pdf](http://missingchildreneurope.eu/Portals/1/Docs/Compiled_research_report_final.pdf) [accessed on: 13 February 2023].

<sup>66</sup> K. Van Hoorde, M. Putters, G. Buser, S. Lembrechts, K. Ponnet, T. Kruger, W. Vandenhoe, H. Demarré, N. Broodhaerts, C. Coruz, A. Larcher, D. Moralis, C. Hilpert, N. Chretiennot, *Bouncing ...*, pp. 5–6.

<sup>67</sup> According to the Committee on the Rights of the Child, Article 3 para. 1 of the CRC (principle of best interest of the child) and Article 12 of the CRC (the child's right to be heard) have complementary roles: the first aims to realize the child's best interests, and the second provides the methodology for hearing the views of the child or children and their inclusion in all matters affecting the child, including the assessment of his or her best interests. Article 3 para. 1 cannot be correctly applied if the requirements of Article 12 are not met. Similarly, Article 3 para. 1 reinforces the functionality of Article 12 by facilitating the essential role of children in all decisions affecting their lives, see: Committee on the Rights of the Child, *General Comment No. 14*, para. 43.

<sup>68</sup> HCCH, *Guide to Good Practice...*, para. 237.

<sup>69</sup> R. Schuz, *The Hague...*, pp. 404–405.



child should not be confused with self-determination, and it should be conducted in such a manner that it avoids placing the burden of decision-making on the child<sup>70</sup>.

Arguably, mediation may contribute to the implementation of a child's rights under Article 12 of the CRC equally well as or even better than judicial proceedings<sup>71</sup>. Involving the child in the mediation can be regarded as a way of implementing the child's participatory rights and the right to stay informed, but it can equally be helpful in discovering whether there might be grounds for the refusal of return, e.g. under Article 13 para. 1 (b) of the 1980 Hague Convention (the exception of a grave risk of harm), or under Article 13 para. 2 of the 1980 Hague Convention (the child's objection to return)<sup>72</sup>.

Notably, "the voice of the child" can be brought into international family mediation in different ways. Children can be involved in the proceedings either directly, when they participate in mediation sessions (child-inclusive mediation), or indirectly, when a separate interview with the child is arranged for and the child's views are reported back to the parents<sup>73</sup>. Child-inclusive mediation, which actively promotes the actual hearing of the child, more formally fulfils the requirements of Article 12 of the CRC. However, practice thus far has demonstrated that international family mediation has favoured child-focused mediation over child-inclusive mediation<sup>74</sup>. However, the adoption of the Brussels II ter Regulation, which strengthens the right of the child to express his or her views in return proceedings<sup>75</sup>, may have the effect that children will be interviewed more frequently in return cases, both in judicial and in mediation proceedings.

## 6. Conclusions

The 1980 Hague Convention was the first binding international instrument to address the phenomenon of cross-border child abduction which appeared as a side-effect of ongoing globalisation in the second half of the 20th century. With its 103 contracting parties<sup>76</sup>, the 1980 Hague Convention remains the most successful

<sup>70</sup> R. Schuz, *The Hague...*; J. McIntosh, *Child Inclusion as a Principle and as Evidence-based Practice: Applications to Family Law Services and Related Sectors*, "Australian Family Relationships Clearinghouse" 2007, No. 1, p. 5.

<sup>71</sup> M. Skibińska, *Procesowe...*, [w:] *Realizacja...*, Part 5 (in online access).

<sup>72</sup> The exception grounded on the objections of the child under Article 13 para 2 is strictly connected to children's participation in court proceedings; however, the application of this exception is also left to the discretion of the court. The child's objections to the return can be considered depending on her or his age and the degree of maturity. Such individual assessment of the child's capacity is a requirement set forth both in Article 12 para. 1 of the CRC and Article 13 para. 2 of the 1980 Hague Convention.

<sup>73</sup> HCCH, *Guide to Good Practice...*, para. 250. See also S. Vigers, *Mediating...*, pp. 76–77.

<sup>74</sup> S. Vigers, *Mediating...*, p. 86. Through a child-focused mediation, the mediator may draw the parents' attention to the importance of introducing "the voice of the child" into mediation and continuously direct their attention to their child's views and best interest, so that the mediated agreement best suits the child's well-being and possibly considers the child's opinion. Further reading: J. McIntosh, C. Long, L. Moloney, *Child-focused and Child-inclusive Mediation: A Comparative Study of Outcomes*, "Journal of Family Studies" 2014, Vol. 10, Issue 1, pp. 87–95, <https://doi.org/10.5172/jfs.327.10.1.87>. See also, S. Vigers, *Mediating...*, pp. 76–91.

<sup>75</sup> See Articles 21 and 26 of Brussels II ter Regulation.

<sup>76</sup> In November 2022.

and widespread instrument of direct cross-border cooperation between states to deal with this legally very complex, yet in terms of human relations even more challenging situations of the wrongful removal and wrongful retention of children. The practical significance of the 1980 Hague Convention is a direct consequence of the fact that its drafters focused on establishing procedural cooperation and jurisdiction, successfully addressing the legal complexity of international child abduction. Today's concerns surrounding the functioning of the 1980 Hague Convention revolve around the fact that it does not address properly the human face of the cross-border child abduction. This 40-year-old instrument allows only for a **limited** consideration of the specific situation of an individual child, whose **careful** consideration the present-day children's rights approach otherwise dictates.

International family mediation, carried out by a qualified cross-border family mediator, can nevertheless address some of the major downsides of the mandatory return mechanism. It can lead to de-escalating a family conflict, but most importantly, as demonstrated in this article, cross-border family mediation provides means of empowering the parents to come to a mutually acceptable agreement that considers their child's welfare. It could prevent the risk of multiple relocations of the child, while in the long run, it helps to preserve an ongoing relationship between both parents and the child after the family breakup. Equally, international family mediation may contribute to a better implementation of the child's right to be heard and to have their views respected (Article 12 of the CRC). This translates into the recognition that the child is a subject of rights – a rare approach under the 1980 Hague Convention.

The return mechanism regulated in the 1980 Hague Convention and international family mediation are not mutually exclusive. On the contrary, the combination of a widely supported, internationally recognized cooperation mechanism with the benefits of mediation allows the legal problem and its human face to be addressed in parallel. The child's best interest is first considered in mediation by the child's own parents with the assistance of a mediator, subsequently overseen by the Hague court or the court validating the mediated agreement. If properly introduced into the legal and temporal framework of the 1980 Hague Convention, international family mediation can be an optimal solution for safeguarding the child's best interest in cross-border child abduction<sup>77</sup>.

<sup>77</sup> Further reading on international family mediation in cross-border child abduction, see e.g.: C. Paul, S. Kiesewetter (eds.), *Cross-border Family Mediation*, Frankfurt am Main 2014; S. Dominelli, *International and EU Perspective on Mediation: Common Principles in Cross-border Family Mediation*, [in:] *Mediation to Foster European Wide Settlement of Disputes*, F. Pesce, D. Rone (eds.), Rome 2016; N. Gonzales Martín, *International Parental Child Abduction and Mediation*, "Anuario Mexicano de Derecho Internacional" 2015, Vol. 15, Issue 1, pp. 353–412, <https://doi.org/10.1016/j.amdi.2014.09.007>; M. Bialecki, *Praktyczne aspekty mediacji transgranicznej w sprawach z udziałem dziecka*, [in:] *Arbitraż i mediacja – perspektywy prawnoprawna i publicznoprawna: między teorią a praktyką: księga pamiątkowa ku czci Profesora Jana Łukasiewicza*, Ł. Błaszczak, R. Morek, J. Olszewski (eds.), Rzeszów 2018; K. Zagórska, *Mediacje transgraniczne w sprawach rodzinnych*, [in:] *Mediacje ponad podziałami*, M. Tabernacka (ed.), Wrocław 2013; A. Napieralska, *Mediacja transgraniczna – charakterystyka postępowania na przykładzie sporów rodzinnych i gospodarczych*, [in:] *Mediacja: od rozmowy do porozumienia*, M. Romanowski (ed.), Warszawa 2022.

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